(16)

No. 92-344

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION and NATURALIZATION SERVICE, et al,
Petitioners,

VS.

HAITIAN CENTERS COUNCIL, INC., et al,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS URGING AFFIRMANCE

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40 pp

IDENTIFICATION OF *AMICI CURIAE*

This *amici curiae* brief is filed on behalf of Senator EDWARD M. KENNEDY and former Representative ELIZABETH HOLTZMAN, lead sponsors and floor managers of the legislation that became the Refugee Act of 1980, as well as the following Members of Congress: CHESTER G. ATKINS, HOWARD L. BERMAN, BENJAMIN L. CARDIN, JOHN CONYERS, JR., RONALD V. DELLUMS, BARNEY FRANK, SAM GEJDENSON, JOSEPH P. KENNEDY, II, MICHAEL J. KOPETSKI, JOHN LEWIS, KWEISE MFUME, JOHN JOSEPH MOAKLEY, JAMES L. OBERSTAR, MAJOR R. OWENS, NANCY PELOSI, CHARLES B. RANGEL, PAUL SIMON, LOUISE McINTOSH SLAUGHTER, EDOLPHUS TOWNS, JOLENE UNSOELD, and CRAIG A. WASHINGTON.

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BRIEF *AMICI CURIAE* MEMBERS OF CONGRESS URGING AFFIRMANCE

INTEREST OF *AMICI CURIAE*

Amici curiae, identified on the inside front cover of this brief, are 22 Members of Congress and one former Member of the House of Representatives who are concerned with the proper interpretation of the immigration laws. *Amici* include Senator Edward M. Kennedy and former Representative Elizabeth Holtzman, who were lead sponsors and floor managers of the legislation that became the Refugee Act of 1980, in their positions as, respectively, Chairman of the United States Senate Committee on the Judiciary and Chairwoman of the United States House of Representatives Committee on the Judiciary Subcommittee on Immigration, Refugees, and International Law. *Amici* have two vital concerns in this case: (1) ensuring respect for the balance of authority over immigration policy between the legislative and

executive branches that was established by the Refugee Act of 1980; and (2) guaranteeing that persons are not forcibly returned to Haiti who have not had a full and fair determination of their entitlement to the Refugee Act's protections against return to a country of persecution.

INTRODUCTION

On May 24, 1992, President Bush targeted Haitian nationals with an Executive Order ("Executive Order" or "Order") directing the forcible return of all aliens captured on the high seas. President Bush issued the Order despite the executive's own acknowledgement that Haiti's citizens suffer from one of the most brutal examples of government persecution anywhere in the world.[1] With this program of forced return directly to the country of feared persecution, the Defendant-Petitioners have violated the government's most fundamental duty under both domestic and international refugee law: not to repatriate persons in flight from persecution without a procedure to determine the merits of their claims.

By affirmatively intercepting Haitians fleeing their government and returning them to Haiti where the district court found they "face political persecution and even death,"[2] the Defendant-

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[1]For example, the executive recently reported to Congress on the status of human rights in Haiti:

> Following the coup . . ., the [Haitian] army resorted to brutality and massacre to control the population. . . . [T]he army employed violence on several occasions to intimidate opposition political supporters, popular organizations, the urban poor, and the media, and otherwise to discourage antiregime activity. . . . Hundreds were killed in political violence during 1991.

U.S. Dep't of State, *Country Reports on Human Rights Practices for 1991*, 102d Cong., 1st Sess. 633-34 (Joint Comm. Print 1992); *see also* Americas Watch, *et al.*, *Return to the Darkest Days: Human Rights in Haiti Since the Coup* (Dec. 30, 1991).

[2]*Haitian Centers Council, Inc. v. McNary*, No. 92-CV-1258, slip op. at 11 (E.D.N.Y. Apr. 6, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *stay granted*, ___ U.S. ___, 113 S. Ct. 3, *cert. granted*, ___ U.S. ___, 113 S. Ct. 52 (1992).

Petitioners violate congressional will and the express terms of the Refugee Act of 1980 (the "Refugee Act" or the "Act"). The Act mandates protection and procedures under sections 243(h) and 208(a) for evaluating fairly the claims of persecution of those in flight who seek U.S. territorial protection. Section 243(h) embodies the fundamental prohibition of international law not to return refugees to countries in which they fear persecution. The Government's construction of Congress' 1980 amendment of section 243(h) is wholly unsupported by the legislative history.

The creation of a refugee process in Haiti following the issuance of the Executive Order does not affect the separate and distinct requirements to extend these protections to those who have fled their persecutors. The Government's contention that Haitians' claims may be processed only overseas under section 207, and that they may be denied the other refugee protections provided by the Act, contravenes the language and structure of the Act. The Act provides a comprehensive not alternative scheme of protection remedies. The Government's contention to the contrary defies common sense and is without precedent in years of executive application of the Refugee Act. Further, one of Congress' purposes in the Refugee Act was to end discriminatory treatment of refugee groups.

SUMMARY OF ARGUMENT

The Executive Order violates two fundamental principles of the Refugee Act. First, it violates the Act's reaffirmation of the U.S.'s obligations as a signatory of the United Nations Convention Relating to the Status of Refugees ("U.N. Convention"). With the Refugee Act, Congress expressly sought to reaffirm these obligations and enacted the U.N. Convention's neutral, nondiscriminatory definition of "refugee." In addition, it expressly reaffirmed one of the core tenets of the U.N. Convention: Article 33's principle of *non-refoulement* prohibiting any signatory government from returning refugees to the frontiers of persecuting countries.

Second, the Order violates Congress' intent, evident in the Act's language and structure, to create a comprehensive scheme

for refugees fleeing persecution. The Act establishes three distinct and concurrent avenues of protection. It provides, *inter alia*: (1) a revamped overseas processing procedure under section 207 with the neutral U.N. Convention definition of "refugee" as well as an expanded protection for those unable to flee their home countries; (2) a statutory right to apply for asylum under section 208(a) at or within U.S. borders; and (3) mandatory withholding of deportation or return under section 243(h) which reaffirms the U.S.'s obligations under Article 33 of the U.N. Convention. Congress designed this comprehensive system to ensure access to protection on a fair and uniform basis regardless of the refugees' country of origin or location.

The effect of the Executive Order is to return U.S. policy to the pre-Act era when the executive had virtually unlimited discretion over which groups were granted refugee protection in the United States. One of Congress's motivations in passing the Refugee Act was to constrain executive discretion. Congress' purpose in adopting the new definition and international standards was to ensure the extension of protection opportunities to those groups which had been excluded under the prior law's discretionary scheme of *ad hoc* overseas programs, administrative asylum and withholding of deportation.

The Government's two primary arguments in defense of the Order are without merit. First, the Government contends that the Refugee Act's amendment of section 243(h)'s withholding provision was only intended to address a particular set of circumstances which arose in a 1958 Supreme Court decision. The Government contends that Congress amended this provision only to vitiate the holding in *Leng May Ma v. Barber*, 357 U.S. 185 (1958), by extending withholding of deportation benefits to aliens in exclusion proceedings. Neither the language nor the legislative history supports this contention. Moreover, even if this contention is true, the Haitians interdicted by the government while fleeing Haiti share the custodial status of the plaintiff in *Leng May Ma*. Therefore, under the Government's own reasoning, the Haitians before this Court are entitled to withholding procedures under section 243(h).

Second, the Government contends that it may forcibly return refugees to the site of persecution and that overseas refugee processing can constitute an exclusive avenue of protection. As noted, forced return violates the express provision of Article 33 of the U.N. Convention and section 243(h) of the Act. Moreover, the language, structure and legislative history of the Act, as well as years of executive application of the Act, demonstrate that Congress intended that the Act's three separate but concurrent forms of refugee protection comprise a comprehensive scheme. For all these reasons, *amici* believe that the Refugee Act and the international obligations it embodies require that this Court affirm the decision of the United States Court of Appeals for the Second Circuit enjoining the Executive Order.

ARGUMENT

The Executive Order of May 24, 1992,[3] contravenes Congress' intent as demonstrated by the language, structure, and legislative history of the Refugee Act of 1980.[4] Heralded as "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress,"[5] the Refugee Act was the first legislation to establish a clear and comprehensive U.S. commitment to the protection of refugees.[6] The ideal of refugee protection embodied in the Act affirmed a historic and even sacred aspect of the U.S. national identity and heritage.[7] Congress expressed the purpose of

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[3]Exec. Order No. 12,607, 57 Fed. Reg. 23,133 (1992).

[4]Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act amended the Immigration and Nationality (McCarran-Walter) Act of 1952, 8 U.S.C. §§ 1101, *et seq.* (1970 & West Supp. 1992) ("I.N.A.").

[5]126 Cong. Rec. 4501 (1980) (remarks of Rep. Rodino).

[6]*See generally* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 11-12 (Dec. 1981).

[7]"It reflects one of the oldest themes in American history — welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns. . . ."

the Act in terms of "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homeland,"[8] and to establish a "national policy of welcome to refugees."[9] Congress also sought to reaffirm existing U.S. obligations under international law.

I. THE EXECUTIVE ORDER VIOLATES CONGRESS' INTENT THAT THE REFUGEE ACT OF 1980 REAFFIRM U.S. OBLIGATIONS UNDER INTERNATIONAL REFUGEE LAW.

Congress expressly intended the Refugee Act to overhaul the respective roles of the executive and the legislative branches in refugee and asylum decisions.[10] Specifically, Congress sought to end the previous *ad hoc* and discriminatory refugee policy domi-

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S. Rep. No. 256, 96th Cong., 2d Sess. 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141. *See also* comments of State Department witness James Carlin during earlier hearings: "we should remember that the United States is a land of immigrants, and since the founding of the Republic we have had a special national heritage of concern for the uprooted and persecuted." *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 16 (1977) (*"Hearings on H.R. 3056"*).

[8] *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4-5 (1979) (*"Hearings on H.R. 2816"*).

[9] S. Rep. No. 256, *supra*, at 3.

[10] In enacting this sweeping legislation, Congress acted pursuant to its plenary power in the area of immigration. Article I, Section 8, Clause 4 of the U.S. Constitution empowers Congress to "establish an uniform Rule of Naturalization," thereby bestowing on Congress power in this field. As the Supreme Court stated in 1909, "[O]ver no conceivable subject is the legislative power of Congress more complete. . . ." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*quoting Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

nated by the executive's foreign policy concerns.[11] Congress replaced it with a uniform, statutory regime in conformance with the universal and ideologically neutral standards of the U.N. Convention.[12] As the Supreme Court stated in 1987, "[i]f one thing is clear from . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol. . . ."[13]

The cornerstone of the U.N. Convention is the Article 33 mandatory prohibition against return or *"refoulement"*:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on

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[11] Senator Kennedy, one of the Refugee Act's primary sponsors, expressed this concern at one of the first hearings on the legislation:

> For too long our policy toward refugee assistance has been *ad hoc*, with refugees being admitted in fits and starts, and after long delays and great human suffering, because our existing immigration law is inadequate, discriminatory, and totally out of touch with today's needs.

The Refugee Act of 1979: Hearing on S. 643 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 1 (1979) (opening statement of Sen. Kennedy).

[12] *See* United Nations Convention Relating to the Status of Refugees, open for signature July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 ("U.N. Convention"). The U.N. Convention was incorporated into U.S. law by the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force with respect to the United States on Nov. 1, 1968) ("U.N. Protocol"). The terms "U.N. Convention" and "U.N. Protocol" are often used interchangeably.

[13] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (citations omitted). *See also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 551-52 (9th Cir. 1990); *Doherty v. United States Dep't of Justice, INS*, 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds sub. nom. INS v. Doherty*, ____ U.S. ____, 112 S. Ct. 719 (1992); *Yiu Sing Chun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983); *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *rev'd sub nom. INS v. Stevic*, 467 U.S. 407 (1984).

account of his race, religion, nationality, membership of a particular social group or political opinion.

U.N. Convention, art. 33, para. 1. By ratifying the treaty, the United States obligated itself to comply with Article 33's mandate not to return a refugee to the borders of a persecuting country by exercising its pre-existing discretion under section 243(h) in a non-discriminatory manner.[14] With the Refugee Act, Congress amended section 243(h) of the I.N.A. expressly to reaffirm this obligation of the United States under international law. *See* section IIA, *infra*.

The U.N. Convention defines "refugee" in strictly non-ideological terms and prohibits signatory states from implementing refugee programs on the basis of the applicant's politics or country of origin.[15] The Refugee Act adopted a new definition of "refugee" in conformance with the U.N. Convention's definition.[16] In so doing, Congress ended the prior discretionary scheme under which the executive determined refugee admissions on an

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[14]*See INS v. Stevic*, 467 U.S. 407 (1984)(court concluded that the Attorney General could and should use his discretionary powers under the I.N.A. to comply with Article 33 of the U.N. Convention).

[15]Article 1 defines the term "refugee" as "any person who:"

> . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . .

U.N. Convention, art. 1, para. A(2); *see also id.*, art. 3 (mandating that each contracting state apply the provisions of the U.N. Convention "without discrimination as to race, religion or country of origin").

[16]Congress repeatedly stressed this important change achieved by the Act. Senator Kennedy introduced the legislation in the Senate with the following description:

> The new definition makes our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees, and provides as well for "displaced persons" within their own country.

126 Cong. Rec. 3757 (1980)(remarks of Sen. Kennedy). Representative Holtzman employed a similar description when introducing it in the House:

ad hoc and often discriminatory basis. Instead, the Act instituted a definition of "refugee" that is internationally recognized and amenable to legal interpretation.[17]

The Executive Order violates the explicit language and intent of Congress under section 243(h) and Article 33 which prohibit the executive from returning refugees directly to countries of persecution. The Order singles out one group by designing a program aimed exclusively at Haitian nationals, whereas Congress intended to create access to protection on a fair, neutral and non-discriminatory basis.

II. THE EXECUTIVE ORDER VIOLATES CONGRESS' INTENT THAT THE ACT'S THREE AVENUES OF REFUGEE PROTECTION COMPRISE A COMPREHENSIVE SCHEME OF PROTECTION THAT WOULD ENSURE ACCESS BY ALL PERSONS REGARDLESS OF THEIR LOCATION.

The Government contends that the Order legally denies Haitians withholding procedures because, after instituting its program

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> First, the bill provides a new definition of the term "refugee" which essentially conforms to that used under the United Nations Convention and Protocol Relating to the Status of Refugees, and which eliminates geographical and ideological restrictions now applicable. . . .

125 Cong. Rec. 35,814 (1979); *see also*, S. Rep. No. 256, *supra* at 4, 15; H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 19 (1980); 125 Cong. Rec. 23,232 (1979)(remarks of Sen. Kennedy); 126 Cong. Rec. 4499 (1980)(remarks of Rep. Holtzman) ("[t]his new definition finally eliminates the geographical and ideological restrictions applicable to refugees contained in our law since 1952"); 125 Cong. Rec. 4798 (1979) (remarks of Rep. Rodino).

[17]"A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. . . . He does not become a refugee because of recognition, but is recognized because he is a refugee." Office of the United Nations High Commissioner for Refugees' ("UNHCR"), *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 28 (Geneva 1979). The UNHCR Handbook provides significant guidance to the meaning of the Protocol and, by implication, to the Refugee Act. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982).

of forced repatriation, it established a process for Haitians to apply for refugee status under section 207 at the U.S. Embassy in Port-au-Prince, Haiti. This policy violates congressional intent as embodied in the language and structure of the Act. With the Refugee Act, Congress sought to "establish a coherent and comprehensive U.S. refugee policy."[18] This objective found its expression in the reaffirmation of international obligations and in the creation of three distinct statutory protections: section 243(h), section 208(a), and section 207. For those who flee and seek U.S. territorial protection, the Act created a new protection remedy in section 208(a) and reformulated section 243(h) into a mandatory provision. Section 207 rationalized procedures in what had long been an *ad hoc* and chaotic aspect of U.S. immigration policy, that of providing admissions programs for refugees abroad.[19] In creating two separate avenues of relief, Congress institutionalized the historically different roles of refugee resettlement and territorial asylum.[20]

The comprehensive nature of this tripartite scheme was intended to ensure that all fleeing refugees have access to protection regardless of whether they are within the United States, arriving at the border, trapped inside their home countries, in a third country of temporary asylum, or en route from their home country to the United States. The government's conduct in forcing Haitians back to Haiti and funnelling them through section 207 overseas refugee processing violates the purpose of the Act to make these protections comprehensive and to reaffirm the principle of *non-refoulement*.

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[18]H.R. Rep. No. 608, 96th Cong., 1st Sess. 1 (1979).

[19]*See* Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1, 1 n.2 (1987).

[20]"One serves the larger requirements of U.S. policy; the other responds to the immediate needs of individuals." *Id.* at 40.

A. The Legislative History of the Refugee Act Confirms Section 243(h)'s Broad Prohibition Against the Return of any Aliens to a Country of Persecution.

Congress amended section 243(h)'s withholding of deportation provision expressly to reaffirm the U.S.'s international law obligations under Article 33 of the U.N. Convention. Indeed, Congress emphasized this purpose at each step in the legislative history of this provision:

> The Conference substitute adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.

H.R. Conf. Rep. No. 781, *supra*, at 20.[21] The statements of the Act's sponsors in describing the Act reaffirm that the amendment of section 243(h) was designed to make U.S. statutory obligations "consistent with the relevant provisions of the United Nations

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[21]The House report on its bill, H.R. 2816, upon which the Government places so much reliance, *see* Brief of the Petitioners at 53, also stresses this construction of the amendment:

> (2) *Withholding of Deportation.* — Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.
>
> Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. The exceptions are those provided in the Convention. . . .
>
> As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.

H.R. Rep. No. 608, *supra*, at 18.

Convention and Protocol." 126 Cong. Rec. 3757 (1980) (statement of Sen. Kennedy).[22]

Congress achieved this purpose by ensuring that the language of section 243(h) was consistent with its pre-existing treaty obligations forbidding the "return" of refugees as well as their "deportation," and eliminating the requirement that the alien be "within the United States" to qualify for this protection.[23] By amending section 243(h), Congress intended to reaffirm the

[22]Senator Kennedy described this provision of the final bill as follows:

> Also, relative to the suspension of deportation, under Section 243(h) of the Immigration and Nationality Act, it is the intention of the Conferees that the new provisions of this Act shall be implemented consistent with the relevant provisions of the United Nations Convention and Protocol.

126 Cong. Rec. 3757 (1980) (statement of Sen. Kennedy). Representative Holtzman described it in similar terms:

> Finally, the conference report also adopts the House provisions relating to asylum and withholding of deportation. These provisions are consistent with our international obligations under the United Nations Convention and Protocol, and the conferees intend that the new sections be implemented consistent with those international documents.

126 Cong. Rec. 4500 (1980) (remarks of Rep. Holtzman). When introducing the legislation, she described it as follows:

> In addition, the bill amends section 243(h) of the Immigration and Nationality Act, relating to withholding of deportation, to prohibit, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion.
>
> These provisions are consistent with our international obligations, and were supported by the State and Justice Departments in addition to the United Nations High Commissioner for Refugees and numerous other witnesses.

125 Cong. Rec. 35,814-15 (1979) (remarks of Rep. Holtzman).

[23]Former section 243(A) of the I.N.A. read as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1970) (amended 1980). The Refugee Act amended this section to read:

> The Attorney General *shall not* deport *or return* any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h)(1) (West Supp. 1992) (emphasis added).

U.S.'s obligations not to return persons — wherever found — to countries of persecution.

Congress did not intend that the protection of section 243(h) be limited to those inside the United States or at its borders. In contrast, Congress tailored the asylum protection of section 208(a) and the overseas admissions process of section 207 to meet the protection needs of persons who are present in particular locations. Section 208(a) requires the Attorney General to establish a procedure for an alien "physically present in the United States, or at a land border or entry port," and section 207 provides protection to those in their home countries or third countries. Congress was thus aware that it could have similarly limited section 243(h), yet chose not to do so.

To the contrary, when Congress amended section 243(h) in 1980, it removed the phrase "within the United States" without substituting any other geographical limitation. The statute on its face does not limit eligibility to aliens who are within the U.S. territorial waters or at the U.S. border. Rather, the revision of section 243(h) plainly indicates that the statute applies to any alien, including those such as the Haitians who are attempting but have not yet achieved entry into U.S. territory.

Moreover, the amended section 243(h) prohibits "deportation or return." If "deport" connotes removal of an alien *from* the United States, *see* Brief for the Petitioners at 34 n.21, application of fundamental statutory construction principles mandates that the word "return" *not* be limited to returning persons from the United States. A basic premise of statutory construction is that a

statute is to be interpreted so that no words shall be discarded as meaningless, redundant, or mere surplusage. *See United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991); *see also Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981); *Meltzer v. Board of Pub. Instruction*, 548 F.2d 559, 578 (5th Cir. 1977), *aff'd in part, rev'd in part*, 577 F.2d 311 (5th Cir. 1978)(*en banc*), *cert. denied*, 439 U.S. 1089 (1979).

An interpretation of the word "return" that is more consonant with its ordinary meaning is that it refers to a country's custodial power over a person. A country can only "return" someone over whom it has power, and it certainly can have such power over someone who is not within its borders. The U.S. government exercises custodial power over the Haitian plaintiffs when it intercepts them on the high seas. The government thus "returns" Haitian refugees to the "frontiers" of a territory where the refugees' lives or freedom are threatened in direct contravention of section 243(h) as amended.[24]

B. Section 208 Provides Uniform, Statutory Standards and Procedures for those Applying for Asylum from Within the United States.

In addition to amending section 243(h) to reaffirm U.S. treaty obligations, Congress overhauled the procedures by which persons who qualified as refugees could apply for asylum at the border of, or within, the United States. The Act sought to ensure that remedies were available not only for overseas refugees temporarily residing in third countries or those trapped in their countries of origin, but also for those who fled their countries of origin and sought U.S. territorial protections.

As the Supreme Court recognized in *Cardoza-Fonseca*, the creation of statutory asylum under section 208(a) was a major innovation of the Refugee Act. *See Cardoza-Fonseca*, 480 U.S. at 436-44. Congress was particularly concerned with ensuring uni-

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[24]These arguments about the plain language of section 243(h) are more fully treated in Plaintiff-Respondents' brief.

form and equitable access to protection.[25] Congress sought to enact a policy "which will treat *all* refugees fairly"[26] and ensure that *all* asylum applicants would have "an opportunity to have their claims considered. . . ."[27] Section 208(a) of the Act directs the Attorney General to create "a new uniform asylum procedure" to govern administrative grants of asylum.[28] The fair and uniform application of the statutory asylum procedures would be undermined completely if the President could interdict offshore certain disfavored groups and thereby deprive them of the opportunity to apply for protection.

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[25]Although discretionary, section 208(a) is unique in the intent of the statutory language to assure universal access. The statute *directs* the Attorney General to create asylum procedures available to all aliens "physically present in the United States" or applying at the border, "irrespective" of their status. No other provision of the I.N.A. so clearly emphasizes uniformity of application and accessibility, nor so clearly *de-emphasizes* an alien's status. Anker, *Discretionary Asylum, supra*, at 25-29. The importance of universal accessibility and the availability of asylum procedures has been repeatedly emphasized by both courts and commentators. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 981-83 (11th Cir. 1984), *aff'd* (as to remand order only), 472 U.S. 846 (1985); *Augustin v. Sava*, 735 F.2d 32, 37-38 (2d Cir. 1984); *Duran v. INS*, 756 F.2d 1338, 1340-41 (9th Cir. 1985); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1037 n.30 and 1039 (5th Cir. 1982); *Nunez v. Boldin*, 537 F. Supp. 578, 583-87 (S.D. Tex.), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982) (all affirming Congress's intent to assure a right to apply for asylum); *see also* Anker, *Discretionary Asylum, supra*, at 27 n.140; Note, *The Right to Appointed Counsel in Asylum Proceedings* 85 Colum. L. Rev. 1157, 1168 (1985).

[26]S. Rep. No. 256, *supra*, at 2 (emphasis added).

[27]*Id.* at 9; *see also* 125 Cong. Rec. 23,233 (1979)(remarks of Sen. Kennedy).

[28]I.N.A. § 208(a), 8 U.S.C. § 1158(a) (West Supp. 1992); *see also* S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, *supra*, at 18 (section 208 "requir[ed] the Attorney General to establish [an asylum] procedure" that was "fair and workable"); H.R. Conf. Rep. No. 781, *supra*, at 20; *Yiu Sing Chun*, 708 F.2d at 872 (*quoting* H.R. Conf. Rep. No. 781, *supra*).

C. Section 207 Provides Systematic Procedures for the Admission of Refugees from Abroad Who Are Deemed to Be "Of Special Humanitarian Concern."

Congress also rationalized the third avenue of refugee protection, that of overseas refugee processing. Congress ended the chaotic and restrictive practice of group-based parole and replaced it with systematic procedures for the admission of refugees from abroad who Congress and the executive deem to be "of grave humanitarian concern" to the United States.[29] To establish a comprehensive regime that would include the opportunity for protection for *all* people in *all* circumstances who are in need, Congress adopted a definition of "refugee" that extended protection beyond what was required by the U.N. Convention. That treaty defined "refugee" to include only those persons who have left their home countries. *See* n. 15, *supra*. The Refugee Act, however, expanded this definition in its overseas admission program to include those in special circumstances, such as political

[29]I.N.A. § 207(d)-(e), 8 U.S.C. § 1157(d)-(e) (West Supp. 1992). Under the overseas refugee process, Congress and the executive consult on an annual basis to determine which groups of refugees are of "special humanitarian concern" and designated for admission to the United States. Both the numbers and the group designations are determined during the annual consultative process.

Congress emphasized that in selecting refugee groups for admission, "the plight of the refugees themselves as opposed to national origins or political considerations should be paramount." H.R. Rep. No. 608, *supra*, at 13. The statute enumerates several factors that may be considered during the consultative process, including the impact "on the foreign policy interests of the United States." The statute, however, does not identify numerical limits, special humanitarian concern, or a foreign policy impact for consideration in section 208(a) asylum or section 243(h) withholding decisions. The only statutory criterion for asylum is the well-founded fear standard contained in the refugee definition. I.N.A. § 208(a), 8 U.S.C. § 1158(a); I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (West Supp. 1992). Similarly, the sole criterion for section 243(h) withholding relief is a threat to "life or freedom ... on account of race, religion, nationality, membership in a particular social group, or political opinion." I.N.A. § 243(h), 8 U.S.C. § 1253(h)(1).

prisoners, who are trapped in their countries of origin.[30] This broadening of the definition of refugee to include those who are unable to leave their home countries comports with the Act's overall purpose to ensure access to protection to all persons regardless of their location.

This broadening reflected congressional concern for groups of persecuted persons who, because of "unusual circumstances," were unable to leave their home countries. The sponsor of the amendment, Representative Fascell, stated his understanding that section 207 overseas processing was for those refugees "who have not left" — and indeed are unable to leave — their countries of origin.[31] In particular, Congress had in mind detained political dissidents, prisoners, and others for whom it would be impossible or impractical to escape their countries.[32]

Indeed, the House Report expressly stated that this new procedure would "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world ... Recent examples ... are the

[30]*See*, I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(B); I.N.A. § 207(e), 8 U.S.C. § 1157(e). Representative Zablocki summarized the broadened definition as follows:

> With respect to the U.S. foreign policy interests, the conference report retains the House version of the definition of "refugee." The House amendment specifically broadened the U.S. definition to bring it into line with the definition recognized by the United Nations, and included presidentially specified persons within their own country who are being persecuted or who fear persecution.

126 Cong. Rec. 4503 (1980) (remarks of Rep. Zablocki).

[31]125 Cong. Rec. 37,200-01 (1979) (remarks of Rep. Fascell).

[32]*See* Anker & Posner, *The Forty Year Crisis*, *supra*, at 60-61; *see also* Hearings on H.R. 2816, *supra*, at 24 (remarks of Rep. Holtzman and testimony of Attorney General Griffin Bell).

Chilean and Cuban prisoners brought directly into the United States . . . [and] prisoners in Argentina and other Latin American countries."[33] Similarly, a Senate Report stated that the definition of refugee was amended to "include 'displaced persons' . . . to handle such situations as the evacuation of Saigon . . . [and to] accommodate political prisoners and detainees who need resettlement opportunities outside their country."[34] Thus, Congress intended to expand refugee protections to reach those who are trapped in their home countries. It is entirely incongruous that the government now seeks to use overseas processing as a justification for forcing back those refugees who already have accomplished their escape from Haiti. *See* section IVB, *infra*.

III. CONGRESS ENACTED THE REFUGEE ACT OF 1980 IN PART TO LIMIT THE POLITICALLY-INFLUENCED EXECUTIVE DISCRETION THAT PREVAILED PRIOR TO ITS ADOPTION.

One of Congress' goals was to restrain the previously unfettered discretion of the executive in the area of refugee protection, asylum and admissions. The executive exercised such discretion prior to 1980 primarily through its parole authority.[35] Congress intended that the parole power in section 212(d)(5) of the I.N.A.

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[33]H.R. Rep. No. 608, *supra*, at 9-10; *see also Hearings on H.R. 2816, supra*, at 21 (testimony of Attorney General Griffin Bell). Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs also stated that, "[w]e ought to be able to move people directly out of [their] country. . . . In the Cuban case, obviously, we are moving people directly out of Cuba. . . ." *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 69 (1979); *see also* Anker & Posner, *The Forty Year Crisis, supra*, at 60-61.

[34]S.Rep. No. 256, *supra* , at 4.

[35]*See*, former I.N.A. § 243(h), 8 U.S.C. § 1253(h) (1970) (amended 1980); former I.N.A. § 212(d) (5) 8 U.S.C. § 1182 (d)(5) (1970) amended 1980). Section 212(d)(5) gave the Attorney General discretion to parole into the U.S. persons during emergencies or when the Attorney General determined parole was in the public interest.

be used for the entry of otherwise inadmissible individuals.[36] However, starting with President Eisenhower's use of the parole provision to admit a large group of refugees from Hungary, the executive repeatedly used the parole authority to admit large groups of refugees *ad hoc* — often for expressly political reasons[37] — instead of individuals on a case-by-case basis.[38] In addition to the use of parole for overseas admissions, Congress had no statutory procedures for the granting of asylum protection to those in the United States or at its borders. The only domestic procedure was the withholding of deportation provision, which was purely discretionary and applied by the executive in a discriminatory manner.[39] The executive's discriminatory use of the parole

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[36] *See* Note, *Refugees Under United States Immigration Law*, 24 Clev. St. L. Rev. 528 (1975).

[37]*See* S. Rep. No. 256, *supra*, at 6 (reporting that of the 1,027,407 refugees admitted under parole programs, only about 2,700 were from noncommunist countries).

[38]The executive candidly admitted this overstepping of its authority:

> The parole, interestingly enough, is given exclusively to the Attorney General. After the fall of Saigon we brought in 133,000 Vietnamese in 1975 under the parole authority. We have done this now extensively all over the world. We had a parole for Lebanese; we had a parole for Argentines, we have other paroles for other groups.
>
> So, what we have really done is to develop a system outside of the legislative authority which was never, frankly, properly intended. The Attorney General is the first to say this.

Briefing on the Growing Refugee Problem: Implications for International Organizations, Hearings Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 10 (1979) (statement of Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs).

[39]*See* n.23, *supra; see generally* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash. U. L. Q. 59 (1976). When Congress amended the statute in 1980, it eliminated the requirement that the persecution be physical.

and withholding provisions continued even after the adoption of the U.N. Convention in 1967.[40]

Congress was aware of this history and repeatedly expressed concern during the 1970's that the Attorney General was exercising its discretion in a manner inconsistent with the nonideological and humanitarian goals of the U.N. Convention.[41] Legislators advanced various proposals to remedy the perceived defects in the law and to end the era of *ad hoc*, discretionary, and discriminatory decision-making.[42] None of these efforts, however, bore fruit until 1980. Congress' concern with the executive's use of politically

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[40]*See generally* Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 Mich. J.L. Ref. 243, 249-50 (1984). Regulations promulgated as late as 1974 afforded the Immigration and Naturalization Service ("INS") complete discretion over refugee admissions and failed to articulate any eligibility standards. *See* 8 C.F.R. §§ 108.1, 108.2 (1976); *Stevic*, 467 U.S. at 420 n.13. The regulations permitted the executive to continue its practice of adjudicating claims at least partially on the basis of foreign policy considerations; most notably, persons fleeing non-communist persecution were largely excluded from relief under section 243(h). *See* n.37 *supra,; see also* Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495, 500-11 (1986); Note *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. Rev. L. & Soc. Change 107, 123-25 (1978).

[41]*See* Anker & Posner, *The Forty Year Crisis, supra*, at 20-30; *see also Cardoza-Fonseca*, 480 U.S. at 435 n.16 (*citing* legislative materials concerning "various unacceptable geographic and political distinctions"); *id.* at 442 n.27 ("[t]he 1980 Act was the culmination of a decade of legislative proposals for reform in the refugee laws") (citations omitted); *Hearings on H.R. 3056, supra*, at 77 (remarks of Rep. Eilberg).

[42]For example, Representative Eilberg sponsored a refugee bill in 1977 that would have constrained executive discretion. During hearings on the bill, he stated:

> I am deeply concerned that, under current law and procedures, Congress has surrendered — to a great extent — its authority to regulate the flow of refugees to this country. Our bill represents an attempt to restore this authority and, at the same time, to establish a proper balance between the executive and the legislative branches

motivated selection criteria under pre-Act policy sounds as a recurrent theme in the legislative history of the Refugee Act.[43]

In particular, the Act's legislative history reveals that the executive's discriminatory policies in dealing with Haitian refugees during the 1970's constituted one of the motivating forces behind the Act.[44] Congressional hearings[45] and a special congres-

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> of Government in establishing the appropriate procedures governing their admission.

Hearings on H.R. 3056, supra, at 59 (statement of Rep. Eilberg, chairman of the Subcomm.); *see also Admission of Refugees into the United States, Part II: Parole of Additional 15,000 Indochina Refugees, Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 15 (1977) (statement of Rep. Eilberg).

[43]*See* Anker & Posner, *The Forty Year Crisis, supra*, at 34, 36, 41, 46-48, 56, 63, 88-89. Representative Rodino expressed this concern when introducing the legislation:

> Ever since the close of World War II, we have had to face emergent and unforeseen refugee situations in all parts of the world. For some of these emergencies we were able to respond by special legislation. For others, we have acquiesced in having the Attorney General use his "parole" authority under the Immigration and Nationality Act. The Attorney General is not comfortable with utilizing this authority and we, who have been closely associated with immigration and refugee matters, are also not comfortable with it.

125 Cong. Rec. 4798 (1979) (statement of Rep. Rodino); *see also id.* at 4800 (1979) (remarks of Rep. Holtzman echoing this concern).

[44]When introducing the final version of the legislation, Representative Holtzman stated that the Act would address the Haitian crisis by establishing a statutory procedure for processing asylum claims:

> With respect to the problem of the Haitians, this bill sets up for the first time in the country's history a statutory procedure for asylum. Whether any particular Haitian will qualify under the law for asylum is a matter to be determined by the Attorney General under appropriate regulations.

126 Cong. Rec. 4507 (1980) (statement of Rep. Holtzman). Representative Chisholm had previously brought the issue to the forefront, arguing at length that "Haitians are in fact political refugees." 125

sional report[46] on the mistreatment of Haitian asylum applicants — who had been denied due process rights in applying for protection under the regulatory asylum and the limited withholding provision of earlier law[47] — contributed to the introduction of

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Cong. Rec. 35,820 (1979) (remarks of Rep. Chisholm); *see also id.* at 35,820-25. Representative Chisholm explained:

> While supporting H.R. 2816, I also wish to briefly address the tragic plight of Haitian refugees. Since 1972, 8,000 to 10,000 black men, women, and children have fled the oppressive Duvalier regime and sought political asylum in the United States. Thousands have languished in South Florida for 5, 6, and up to 7 years, uncertain of their fate, and in desperate fear of forced return to Haiti. . . .
>
> The Haitian Government, the State Department, and INS would have us believe, these boat people are not political refugees, but rather flee to the United States for economic reasons. The Congressional Black Caucus has studied this question carefully and has concluded that there can be no doubt that Haitians are in fact political refugees.

125 Cong. Rec. 35,820 (1979) (remarks of Rep. Chisholm); *see also* 125 Cong. Rec. 23,251 (1979) (introduction and withdrawal of proposed Senate amendment to include Haitians expressly within the definition of "refugee").

[45] *Human Rights in Haiti: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 1st Sess. (1975).

[46] *Haitian Emigration: Report of the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976).

[47] Shortly after adoption of the Refugee Act, Senator DeConcini commented on the discriminatory treatment of Haitians to then Secretary of State Cyrus Vance:

> If you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are boat refugee from Baby Doc's Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes.

United States Refugee Programs: Hearing Before the Senate Comm. on the Judiciary, 96 Cong., 2d Sess. 14 (1980) (remarks of Sen. DeConcini); *see generally* Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy. U.S. Immigration Policy* 163 (1984 ed., Richard R. Hofstetter).

the statutory asylum provision into the proposed legislation.[48] Much of the floor debate on the bills that later became the Refugee Act was devoted to the then-occurring crisis of the Haitian boat people. *See* n.44, *supra*.

Congress' intent to restrain executive discretion is apparent in five of the Act's most important provisions.[49] First, Congress virtually eliminated the previously vast power of the Attorney General to parole particular groups of refugees into the U.S (and refuse to parole others), often for short-term foreign policy objectives. *See* pp. 18-20, *supra*. Second, Congress replaced the executive's ad hoc discretion under an administrative asylum procedure with section 208(a)'s statutory procedures. *See* section IIB, *supra*. As noted above, Congress was also motivated to

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[48] The subcommittee insisted on the need for statutory asylum procedures over INS objections that the amended section 243(h) was enough, referring to its report which criticized on due process grounds procedures followed by the INS in adjudicating Haitian asylum and section 243(h) claims. *Hearings on H.R. 3056*, supra, at 93 (remarks of Rep. Eilberg) ("[t]his subcommittee has criticized, in its recent report on Haitian emigration, the procedures followed by INS in adjudicating asylum and 243(h) claims"); *see also id.* at 126-27 (remarks of Rep. Holtzman); Anker & Posner, *The Forty Year Crisis*, *supra*, at 41. Witnesses who testified before the House subcommittee directed Congress' attention to the existing "procedures for determining asylum applications under section 243(h) [which were] woefully inadequate and . . . the subject of a civil suit recently filed in Miami on behalf of Haitian nationals." *Hearings on H.R. 2816*, *supra*, at 170 (testimony of A. Whitney Ellsworth and Hurst Hannum, Representatives, Amnesty International, U.S.A.). The same witnesses called for a "separate and uniform asylum procedure," a call heeded with Congress' provision of section 208(a).

[49] The House was so intent upon restraining executive discretion that its version of the bill provided a "legislative veto" over the executive's ability to admit refugees in excess of the then established "normal flow" of 50,000 refugee admissions per year. *See* 126 Cong. Rec. 4505 (1980) (remarks of Rep. Sensenbrenner). The Conference bill dropped this provision in favor of the Senate's version, but it was such a major concern that the final Conference bill only barely passed the House, 207 to 192. *See id.* at 4508 (1980).

create neutral and uniform statutory asylum procedures in part by the experience of the Haitian refugees in the 1970's. *See* nn.44-46, *supra.*

Third, when revamping procedures for processing and admitting refugees from abroad under section 207, Congress ensured its own role in checking executive discretion by mandating regular consultation between the executive and Congress, thereby routinizing congressional input into refugee policy and admissions.[50] This was of great import to Congress, especially in the House.[51] Fourth, Congress amended section 243(h) to prohibit the executive from deporting or returning any alien whose "life or freedom would be threatened" in his or her homeland. This protection had previously been reserved to the executive's absolute discretion and was rarely exercised in favor of the alien. *See* section IIA *supra.* Finally, Congress put an end to the era of executive-dominated and discretionary refugee admissions policies with their express geographical and ideological components in the definition of "refugee" by reaffirming the U.S.'s international obligations as a signatory of the U.N. Convention.

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[50]*See* n.29, *supra; see also* 125 Cong. Rec. 23,232 (1979) (statement of Sen. Kennedy) (Refugee Act "provides for the first time the statutory requirement that Congress be consulted before refugees are admitted, and defines and exerts congressional control over the process"). The President must submit a detailed report to Congress on the status of refugees throughout the world and a proposal for the admission of refugees into the United States. See I.N.A. § 207(d)(1), 8 U.S.C. § 157(d)(1) (West Supp. 1992). After congressional hearings on the President's proposal, a joint plan for the admission of refugees from the various regions of the world is adopted. *See* I.N.A. §§ 207(a)(3) and (d)(3), 8 U.S.C. §§ 1157(a)(3) and (d)(3) (West Supp. 1992); see also Carolyn P. Blum & Michael D. Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy,* 16 N.Y.U. Rev. L. & Soc. Change 55, 66 n.69 (1987-88). The President also must undertake appropriate consultation with Congress on any emergency refugee initiatives. *See* I.N.A. § 207(b), 8 U.S.C. § 1157(b) (West Supp. 1992).

[51]*See* 126 Cong. Rec. 4501-02 (1980) (remarks of Rep. Fish describing the final legislation's consultation provisions).

IV. THE GOVERNMENT'S ARGUMENTS IN DEFENSE OF THE ORDER ARE UNSUPPORTED BY THE LEGISLATIVE HISTORY OF THE REFUGEE ACT OF 1980.

A. The Legislative History Does Not Support the Government's Contention that Congress Amended Section 243(h) Only to Extend Withholding of Deportation Procedures to those in Exclusion Proceedings.

The Government argues that Congress removed the phrase "within the United States" from, and added the words "or return" to, the text of section 243(h) of the I.N.A. for the sole purpose of extending mandatory withholding of deportation to "excludable aliens who were apprehended at the border and paroled into the United States." *See* Brief for the Petitioners at 52-53. Specifically, the Government contends that Congress intended the amendment of section 243(h) to provide only for those persons with the same status as the plaintiff in the case of *Leng May Ma v. Barber*, 357 U.S. 185 (1958).[52] *See* Brief for the Petitioners at 53.

The legislative history of the Refugee Act does not support the Government's position. There is simply no mention of *Leng May Ma* anywhere in the legislative record. It is an odd construction of a statute that ignores its plain meaning in favor of a specific, narrow reading based on a twenty-year-old case, especially when

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[52]Leng May Ma was a Chinese woman who came to the United States in 1951. She was held in custody and later released on parole to give her the opportunity to prove her claim of citizenship. Three months later, after having failed to establish that claim, the INS ordered her deportation. The Supreme Court thereafter denied her application for withholding of deportation under the former section 243(h). In so ruling, the Court held that an alien initially taken into custody and subsequently paroled into the United States was legally considered outside the United States and, thus, not entitled to apply for withholding protection. *Leng May Ma*, 357 U.S. at 188; *see also Landon v. Plasencia*, 459 U.S. 21, 25 (1982); *Amanullah v. Nelson*, 811 F.2d 1, 7 (1st Cir. 1987); *Bertrand v. Sava*, 684 F.2d 204, 205 (2d Cir. 1982); *Pierre v. United States*, 547 F.2d 1281, 1289 (5th Cir.), *vacated on other grounds*, 434 U.S. 962 (1977); *Gerrero v. Moyer*, 738 F. Supp. 1164, 1165 (N.D. Ill. 1990).

the case itself was never mentioned in the extensive legislative history of the statute. Moreover, there is no other indication that Congress intended to restrict the protections of section 243(h) to the narrow class of persons who, like Leng May Ma, were paroled into the United States prior to their application for section 243(h) relief. If Congress had intended to so restrict this section, it could have achieved that result more easily and clearly than by removing the former requirement that persons be "within the United States." For example, following its choice of wording for section 208(a), Congress could simply have restricted section 243(h) to those applying at the border of the United States and who have been paroled temporarily into the United States.

Even if the Government were correct that the holding in *Leng May Ma* motivated Congress' concern when amending section 243(h), the Haitians before this Court qualify under the Government's construction of the provision. The *Leng May Ma* Court held that the plaintiff was not "within the United States" (and thus subject to exclusion proceedings and denial of withholding of deportation) because she had been apprehended and taken into custody before making an entry into the United States. The Court reasoned:

> For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. It seems quite clear than *an alien so confined* would not be "within the United States" for purposes of § 243(h).

Leng May Ma, 357 U.S. at 188 (citations omitted)(emphasis added).

In *Leng May Ma*, the Court found that parole was an extension of custody and cited cases equating parole and detention. *See id.* at 189 (*citing Kaplan v. Tod*, 267 U.S. 228, 230 (1925)). Leng May Ma's "in-custody" status was thus maintained even after she was paroled at large because of official U.S. intervention and authority over her. The Court concluded that Leng May Ma was not "within the United States" because U.S. governmental intervention prevented her from legally "entering" the United States. "Entry" is not accomplished until "physical presence of an alien in this country is accompanied *by freedom from official restraint.*"

United States v. Kavazanjian, 623 F.2d 730, 736 (1st Cir. 1980)(emphasis added)(*citing United States v. Oscar*, 496 F.2d 492, 493-94 (9th Cir. 1974); *Vitale v. INS*, 463 F.2d 579, 581-82 (7th Cir. 1972); *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954); *Klapholz v. Esperdy*, 201 F. Supp. 294, 297 (S.D.N.Y. 1961), *aff'd*, 302 F.2d 928 (2d Cir.), *cert. denied*, 371 U.S. 891 (1962)).

The Haitian plaintiffs in this case share with Leng May Ma the status of having been apprehended and placed in U.S. custody before making an entry into the United States. Indeed, the Haitians' "in-custody" status is no legal fiction: the U.S. government is intercepting fleeing Haitians and returning them to Haiti through the exercise of physical force. Thus, even if the Government's construction that Congress revised section 243(h) to address concern over *Leng May Ma* is accepted, that concern would include the Haitians now before this Court.

B. The Legislative History Does Not Support the Government's Contention that Avenues of Refugee Protection Under Sections 243(h) and 208(a) May Be Denied to Haitians Because Section 207 Overseas Processing Is Available.

The Government's argument that returned Haitians may apply through a newly created overseas section 207 process is entirely inconsistent with the structure and purpose of the Refugee Act's comprehensive scheme. There is no precedent for the Government's position that one protection may be made available to the exclusion of the other two statutory protections. Section 207 was not intended to be, and is not structured in the Act as, a substitute for sections 243(h) and 208(a).

These three provisions appear in separate sections of the Act; they are not mutually exclusive and nothing in the Act renders them preclusive of each other. The administrative agency implementing the Act, though confronted with the question many times, has never held that the existence of an overseas process precludes access to other protections. Indeed, it has increasingly de-emphasized the avoidance of an overseas process as a

significant factor to consider in the exercise of administrative discretion under section 208(a).[53]

Moreover, there are clear differences in language, structure, and purpose between section 207 and sections 208(a) and 243(h). For example, numerical limits apply to the allocation of refugees abroad under section 207, and foreign policy is a statutorily permitted criterion in determining the designation of refugees as "of special humanitarian concern." In contrast, foreign policy is nowhere listed as a legitimate consideration in section 208(a) asylum or section 243(h) decisions, and numerical limits only apply after a person is granted asylum and applies for permanent residence status. *See* n.29, *supra.*

Finally, the implementation of the Act confirms that nationals from countries where an overseas section 207 process *exists* never have been denied access to other statutory protections. To the contrary, they have applied for and received protection under sections 208(a) and 243(h). For example, persons fleeing Afghanistan, Iran, the Soviet Union, Cuba, Vietnam, and Ethiopia, among others, are all able to apply for refugee status through section 207 overseas processing *and* apply for and receive asylum relief in the United States.[54] This practice — consistently applied for all groups until the Executive Order — is what is required by the language, structure, and purpose of the Refugee Act.

The nature and manner of establishment of the government's section 207 process for Haitians grossly distorts the protection

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[53]*See Matter of Pula,* Interim Dec. 3033 (BIA 1987). In *Pula,* the Board of Immigration Appeals modified its earlier holding in *Matter of Salim,* 18 I. & N. 311 (BIA 1982) (avoidance of a pre-existing overseas refugee process in a third country a major adverse factor to be considered in the exercise of discretion in asylum decisions). The Board has since denied very few asylum claims on discretionary grounds. *See* Deborah E. Anker & Carolyn P. Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court's Decision in I.N.S. v. Cardoza-Fonseca.* J. Int'l Refugee L. 66, 68 (1989).

[54]During the first decade of the Refugee Act, as indicated in the table below, persons from countries where overseas processing was possible also applied for and received section 208(a) asylum protection:

purposes Congress attempted to effectuate in the Refugee Act. Section 207's overseas process was intended to provide special protection for "presidentially specified" persons who could not flee, *i.e.*, those who were trapped or even imprisoned by their persecutors.[55] The Executive Order does not specify Haitians for special concern nor create new avenues to assist Haitians in escaping their persecutors. To the contrary, it deliberately,

Nationality	207 Admissions	208(a) Applications/Grants
Afghanistan	24,344	1,241 / 468
Iran	34,520	21,961 / 13,411
USSR	201,240	837 / 624
Czechoslovakia	1,974	451 / 109
Hungary	5,690	841 / 219
Poland	36,085	9,086 / 3,013
Romania	37,172	2,675 / 1,676
Cuba	10,352	3,403 / 630
Vietnam	299,197	252 / 87
Ethiopia	23,610	5,102 / 2,422

Bureau for Refugee Programs, U.S. State Dep't, FY 1980-1991 cumulative refugee admission statistics, *reprinted in Refugee Reports,* Vol. 12, No. 12 at 10-11 (Dec. 30, 1991); INS, U.S. Dep't of Justice, June 1983-March 1991 cumulative asylum statistics, *reprinted in id.* at 12.

[55]Section 207 overseas procedures have been used almost exclusively as a means of admitting "presidentially specified persons within their own country who are persecuted or who are threatened with persecution." 126 Cong. Rec. 4499 (1980) (remarks of Rep. Holtzman); *see also* H.R. Conf. Rep. No. 781, *supra,* at 19. For example, with both the Orderly Departure Program in Vietnam begun in 1975 and the processing of Russian Jews in Moscow begun in 1988, the vast majority of those who apply have been granted refugee status (98.3% in FY 1991 under the Orderly Departure Program; 91.4% in FY 1991 under the Moscow program). *Refugee Reports, supra,* at 13. Haitians, however, have never been identified by the President as a group of special concern to the United States. Throughout the 1980's, only 1.8% of Haitian asylum claims were granted as compared, for example, to 74.5% of Soviet claims and 34.5% of Vietnamese. *Refugee Reports, supra,* at 12. True to precedent, Haitians now seeking refugee status at the U.S. Embassy in Port-au-Prince have approval rates of only 9.8%. Brief for the Petitioners at 8 (the Government reports that as of October 30, 1992, the embassy had received applications on behalf of 15,566 persons, and that 245 of the 2,505 applications adjudicated had been approved).

unabashedly returns them to the site of their persecution. With this Order, the government acts as a floating Berlin Wall, forcibly trapping those Haitians that seek to flee their persecutors. Thus, in conception and design, the Executive Order effectuates a complete reversal of the congressional goals embodied in the Refugee Act.

CONCLUSION

Because the Executive Order violates the language, structure, and intent of the Refugee Act of 1980, this Court should affirm the ruling by the United States Court of Appeals for the Second Circuit that the Order be enjoined as illegal.

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